STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 312383 Berrien Circuit Court
BERNARD GOINES, JR., Defendant-Appellant.	LC No. 2012-001173-FH

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and two counts of malicious destruction of property valued under $200, MCL 750.380(5). The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to 30 to 180 months' imprisonment for each of the felonious-assault convictions, to two years' imprisonment for the felony-firearm conviction, and to 93 days in jail for each of the convictions of malicious destruction of property. We affirm.

Defendant's conviction arose from a criminal incident in March 2012 when he approached the house of his former girlfriend, Tracy Ross; pointed a gun at her and her friend, Jessie Morgan; and later smashed two windows in Ross's house with bricks.

Defendant first argues that the trial court erred in admitting evidence of a spent bullet found in Ross's home the day after the charged incidents and after she heard a gunshot. Ordinarily, we review a trial court's evidentiary decisions for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). However, at the hearing for the motion in limine to admit the evidence, defense counsel's objection primarily related to whether Ross would be at trial to testify about the gunshot and related events. The trial court stated that it would preliminarily allow the evidence, subject to any further objections at the time of trial. Defense counsel did not later raise the objection he raises on appeal, which is that "there is nothing tying the recovered physical evidence to any location under the control of the [d]efendant." An objection on one ground does not preserve an appellate attack on another ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We find no plain error. Defendant's argument on appeal is, essentially, that there was insufficient evidence tying the bullet to him. We disagree. Ross testified that she received text messages from defendant stating that "[h]e was gonna shoot that b-tch up, he didn't care who was in the house," and that Ross was "not gonna have . . . no room or car windows." Ross testified that the shooting occurred within minutes after she had hung up on defendant during a telephone conversation. A police officer summoned after the shooting listened to a telephone conversation between Ross and defendant. During the call, Ross told defendant that she was angry with him for shooting into her house. The police officer testified that defendant replied, "You got fingerprints on that bullet?" and started laughing. Contrary to defendant's argument, the evidence was sufficient to show a link between him and the bullet.

A police officer testified that he found 19 individually wrapped rocks of suspected crack cocaine in the general location from where the shot was likely fired. Defendant contends that the trial court precluded him from raising a viable defense when the court refused to allow him to argue during closing arguments that the shot was likely fired by a drug dealer and not by defendant. However, the record indicates that defense counsel had agreed, in a conversation in chambers, to refrain from arguing that a drug dealer fired the shot. It is apparent from the record that counsel made this agreement in order to prevent the prosecutor from arguing that defendant himself had been involved with cocaine. By coming to this agreement, defendant waived the alleged error about which he now complains. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant argues that the prosecutor committed misconduct by misrepresenting the concept of reasonable doubt. "We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, defendant did not object to the challenged remarks, and therefore our review is under the plain-error doctrine. *Id*.

The prosecutor stated:

> The judge's instruction will be that you can't have speculation in this, that can't form the basis of your reason and doubt. Doubt is based on reason and common sense, not speculation.
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> * * *
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> Last point I wanna make. The judge will give you an instruction on what reasonable doubt means. One of the things I think he says, but certainly should if he doesn't, is that reasonable doubt doesn't mean no doubt, right? You weren't there. You didn't see it. You might have some small hesitation in deciding this case. That's not the kind of reasonable doubt we're talking about. Instead, a reasonable doubt is defined as a doubt based on reason and common sense, reason and common sense. It's not just some scientific formula where you can plug in standard variables for X and Y. It's not something you can just prove in a controlled laboratory setting. Instead, when you use your common sense, you have to take into account people's lives, people's emotions, people's thoughts,

> you need to consider their frailties, the love/hate that was going on here, a person's propensities and inclinations, their motives, whether it be jealousy or anger, and you have to take into account the reasonable inferences that are based on your life experiences. That's why you need to consider both, reason and common sense. And that's why we have 12 of you to do that.
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> Reasonable doubt does not mean giving the defendant the benefit of the doubt. I think we've established each of these crimes, each of the elements that comprise these crimes beyond a reasonable doubt . . . .

Defendant takes issue with the prosecutor's statements about "speculation," arguing that reasonable doubt can indeed be based on speculation. However, the prosecutor's remarks are to be read in context, *id*., and the prosecutor repeatedly, and properly, referred to "reason and common sense." CJI2d 3.2, which the trial court provided, has been held to be a proper recitation of the law. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). In accordance with this standard instruction, the court stated:

> Now, a reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that -- a doubt that is reasonable, after all -- after a careful and considered examination of the facts and circumstances of this case.

Under the circumstances, we find no plain error.

Defendant also takes issue with the prosecutor's statement that "[r]easonable doubt does not mean giving the defendant the benefit of the doubt." Arguably, this statement, *standing alone*, would be erroneous. However, we again note that a prosecutor's remarks are to be viewed in context. *Watson*, 245 Mich App at 586. In light of the prosecutor's entire argument and his emphasis on reason and common sense, and especially in light of the trial court's proper recitation of the legal standard, we find no basis for reversal.

Defendant raises numerous issues by way of a supplemental appellate brief. He first contends that reversal is required because the same judge, acting as a district court judge, presided over his arraignment and preliminary examination and then also presided over his trial as a circuit court judge. We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. As noted in *Carines*, *id*. at 763, reversal under the plain-error rule requires a showing of prejudice.[1] See also *People v Huston*, 179 Mich App 753, 756; 446 NW2d 543 (1989) ("as a general rule, a trial judge is not disqualified absent a showing of actual bias or prejudice").[2] Defendant has set forth no case law indicating that presiding over an

[1] We reject defendant's assertion of a "structural error" having occurred in this case.

[2] *Huston*, *id*. at 756-757, also indicates that a showing of actual prejudice is not required if the judge might have prejudged the case because of earlier involvement. Defendant provides no

arraignment or preliminary examination precludes a judge from also presiding over a subsequent trial. Moreover, defendant has set forth no evidence of actual bias and argues merely that the court ruled against him in several respects. "Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009).

Defendant next argues that his two convictions for malicious destruction of property must be vacated because the circuit court had no jurisdiction to entertain misdemeanor offenses. We review this unpreserved issue under the plain-error standard. *Carines*, 460 Mich at 763-764. We find no error; the circuit court had jurisdiction because the felonies and misdemeanors arose from the same criminal transaction.[3] *People v Shackelford*, 146 Mich App 330, 333; 379 NW2d 487 (1985); *People v Reid*, 488 Mich 917; 789 NW2d 492 (2010). As such, we also reject defendant's related argument that the misdemeanors could not be tried in circuit court because the probable-cause determination at the preliminary examination did not deal with those misdemeanors.

Defendant next argues that his convictions are invalid because the court reporter, and not a clerk, swore in the jurors and the witnesses. Again, we review this unpreserved issue under the plain-error standard. *Carines*, 460 Mich at 763-764. We find no plain error. MCL 600.1111 states that "[t]he reporter or recorder shall perform the duties assigned by the rules of the supreme court, and by the court to which he or she is appointed, under the supervision of a judge of the court to which he or she is appointed." MCL 600.1442 states that "[o]aths, affidavits and depositions, in any cause, matter or proceeding in any court of record, may also be taken before any person appointed by the court for that purpose or before any person upon whom the parties agree by stipulation in writing or on the record." Defendant contends that these statutes must be disregarded because they conflict with MCR 2.511(H), which specifies that the *clerk* shall swear in jurors, and because court rules must take precedence in matters of procedure.[4] We find no basis for reversal because it is a viable interpretation that, in accordance with MCL 600.1111 and MCL 600.1442, the court reporter was essentially acting as a stand-in "clerk" for purposes of MCR 2.511(H); given the circumstances and given that the proper oaths *were* administered, we find no basis for reversal under the various tests articulated in *Carines*, 460 Mich at 763-764.

Defendant contends that the prosecutor presented insufficient evidence to prove that defendant committed felonious assault against Ross because her testimony did not establish that defendant pointed a gun at her.

> We review claims of insufficient evidence de novo. In doing so, we must view all the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crimes

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case law indicating that presiding over an arraignment or preliminary examination involves such "prejudging."

[3] Although some hours passed between the various offenses, it is clear that they were all part of an ongoing criminal incident.

[4] We note that MCR 2.511(H) deals with jurors' oaths only and not witnesses' oaths.

> were proven beyond a reasonable doubt. The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt. [*People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009) (citations omitted).]

Felonious assault requires "either an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery." *People v Rivera*, 120 Mich App 50, 53; 327 NW2d 386 (1982). It also requires the use of a dangerous weapon. MCL 750.82

At trial, Ross stated that she did not see anything in defendant's hand during the incident. However, a police officer testified, without objection, that Ross had told him that defendant pointed a gun at her. In addition, Jessie Morgan testified that during the incident, defendant "pull[ed] out a gun" and "aim[ed] [it] straight towards us, me and [Ross]." Given that credibility determinations are left to the jury, we find no basis for reversal.

Defendant argues that the prosecutor committed misconduct in several respects.[5] He first argues that the prosecutor proceeded on the two misdemeanor charges even though the circuit court lacked jurisdiction to consider them and the preliminary examination did not deal with them. This argument is untenable; as discussed above, no error occurred with respect to the trying of the misdemeanors.

Defendant contends that the prosecutor improperly referred to the shooting into Ross's house and "inferential drug procession [sic]." However, the evidence of the shooting was properly admitted as relevant to prove defendant's possession of a gun, and the prosecutor was free to discuss the evidence. As for the "inferential drug possession," defendant is evidently referring to the fact that a police officer testified about finding crack cocaine near the location from where the gunshot was likely fired. However, it was *defense counsel* who first introduced this evidence, and defendant makes no indication in his appellate brief that the prosecutor attempted to tie this cocaine evidence to defendant. In fact, the trial court specifically rejected the prosecutor's subsequent attempt to introduce evidence of defendant's prior conviction of possession with intent to deliver cocaine. The prosecutor acted in good faith, and no misconduct occurred. See *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant claims that the prosecutor improperly vouched for a prosecution witness by stating during closing arguments that Morgan had no motive to lie. The prosecutor's remarks were proper. Indeed, a prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor did not improperly imply that his office had some special knowledge about the witness's credibility. *Id*.

[5] Most of the alleged incidents of misconduct were not objected to at trial and are thus unpreserved. However, they do not require reversal even if we review them as preserved.

Defendant argues that the prosecutor improperly argued during closing arguments that the jury should consider Ross's statement to the police that she saw a gun in defendant's hand and should reject her trial testimony that she did not see a gun. Defendant argues that the prosecutor was emphasizing improper hearsay testimony. However, the testimony in question was *not objected to at trial*. As such, the prosecutor was commenting on the evidence as admitted and did not commit misconduct.[6] Defendant makes the related argument that the prosecutor improperly stated that Ross lied when she testified at trial that she did not see a gun on defendant. However, the context makes clear that the prosecutor was appealing to the evidence, and to Ross's motivation to protect defendant, in making the challenged statement. "A prosecutor may . . . argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Id.*

Defendant takes issue with the following argument by the prosecutor:

> I've got one more -- one more reason why I believe we've established that Malicious Destruction of Property, those charges.
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> And that's, text message number two; March 16th at 8:42 p.m., hours after he broke that front window and the kitchen window, what is he texting? She ain't gonna have no room or car window. Meaning, he did it before; he broke two windows; he may just come back and do it again. Taunting her that he did it, got away with it, and he'll continue to do it. Again, I consider that, and I hope you consider that to be an admission of breaking those windows.
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> So, even though we don't have an eyewitness who actually saw him throw those bricks, given the context that we have and his admissions and his past actions, I don't believe there's any other inference you can draw but that he was the one who threw those bricks.

Defendant contends that there were no "admissions" and that the prosecutor's statements were improper. Once again, we find no misconduct, because the prosecutor was arguing reasonable inferences from the evidence. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

Defendant contends that the prosecutor, in support of the current charges, improperly argued about a prior domestic-violence incident between defendant and Ross. However, in mentioning this prior act, the prosecutor was doing nothing but commenting on evidence that had been properly admitted. No prosecutorial misconduct occurred.

Defendant next argues that his conviction of felonious assault against Morgan was against the great weight of the evidence because it would have been physically impossible for defendant to draw a gun at the time he allegedly did so. See *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (discussing situations in which evidence "defie[s] physical

[6] We also point out that the testimony about Ross's statement to police was essentially cumulative to Morgan's testimony.

realities"). Morgan testified that when defendant appeared at Ross's house, he had a beer bottle in each hand. Morgan stated that "[a]ll of a sudden, [defendant] pulls a pistol out of the front -- pulls his shirt up, pull[s] a pistol out and pointed it." The prosecutor asked Morgan, "Did you see what happened to those beer bottles?" and Morgan answered, "No, sir. No." Morgan then described the gun. We disagree with defendant that Morgan's testimony "contradict[ed] indisputable laws of nature[.]" Morgan stated that he *did not know* what happened to the beer bottles before defendant pulled out the gun. It is entirely possible that one of the bottles dropped onto the grass and Morgan did not see it drop, especially considering that it was nighttime. The verdict was not against the great weight of the evidence.[7]

Defendant argues that his constitutional right of confrontation was violated because Benton Harbor police officer William Althouse "interpreted the crime laboratory report prepared by Michigan State Police analyst Michael Burritt concerning a .32 caliber slug that the prosecution claimed [defendant] fired into Ross' house." Defendant claims that Burritt himself was required to testify. We review this unpreserved issue under the plain-error standard. *Carines*, 460 Mich at 763-764. No plain error requiring reversal is apparent. Althouse testified that the report stated that the item was a .32 caliber bullet and that the "suspect firearm cannot be suggested" "[d]ue to the damage." However, Althouse had already stated that a .32 caliber bullet had been found. Even if any error occurred with regard to the introduction of the report, it did not affect the outcome of the proceedings. *Id*. at 763. Defendant makes a similar argument with regard to Benton Harbor Public Service Officer Preston Alsup, who testified about a laboratory report relating to the 19 packages of cocaine. Alsup testified that the laboratory report identified the substance as cocaine and that no fingerprints were recovered from it. Alsup had already testified about finding 19 individually wrapped rocks of suspected cocaine; even assuming that an error occurred with regard to his testimony about the report, we cannot see how it affected the outcome of the proceedings. *Id*.

Defendant next argues that the trial court erred in admitting evidence of a prior act of domestic violence. The incident occurred on July 4, 2010. Ross testified that defendant threw a jack through her living room window and came back later and broke the "big front picture window."

MCL 768.27b states:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

[7] Defendant also mentions that Morgan replied, "I really couldn't tell if it was one or the other, we were so close," when asked, "And when he pointed that gun, could you tell whether he was pointing it at you, or Miss Ross, or both of you?" Contrary to defendant's implication, we fail to see how this renders Morgan's testimony "patently implausible."

(2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(3) This section does not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

(5) As used in this section:

(a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(*i*) Causing or attempting to cause physical or mental harm to a family or household member.

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) *Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested*.

(b) "Family or household member" means any of the following:

(*i*) A spouse or former spouse.

(*ii*) An individual with whom the person resides or has resided.

(*iii*) An individual with whom the person has or has had a child in common.

(*iv*) *An individual with whom the person has or has had a dating relationship*. As used in this subparagraph, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(6) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006. [Emphasis added.]

Ross testified that defendant was her boyfriend at the time of the 2010 incident. Clearly the 2010 incident and the present incident fall within the parameters of this statute. The 2010 incident was highly probative and the trial court did not err in admitting it.[8]

Defendant contends that the trial court erred in requiring him to pay $300 in attorney fees without considering his indigent status. However, in *People v Jackson*, 483 Mich 271, 298; 769 NW2d 630 (2009), the Michigan Supreme Court stated that an ability-to-pay analysis is required only when enforcement has begun and the defendant contests the payment at that time. Accordingly, appellate relief is unwarranted.

Defendant argues that the trial court erred by failing to give him jail credit against the felonious-assault convictions. The judgment of sentence reflects that that defendant was given the credit against the felony-firearm conviction. This was proper, because the felony-firearm sentence precedes the sentence for the underlying offense. MCL 750.227b(2).

Defendant next argues that he received ineffective assistance of counsel in several respects. In order to establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must also show that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant contends that his attorney erred by allowing the circuit court to hear the two misdemeanor charges. This argument is untenable because the circuit court was allowed to hear the charges, as discussed above. Counsel is not required to raise futile objections. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

Defendant contends that his attorney failed to object to the court reporter's swearing in of the jury.[9] We find no basis for reversal with respect to this argument. Even assuming, arguendo,

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[8] Defendant also seems to be arguing that the evidence of the cocaine should not have been admitted. However, we again note that this evidence was first introduced by defense counsel, who evidently wanted to plant an idea in the jurors' minds that the gunshot may have resulted from an unrelated drug deal. At any rate, the cocaine was not tied to defendant during the trial and therefore any error in the admission of this evidence was not outcome-determinative. Defendant also seems to be arguing that evidence of the bullet should not have been admitted. However, as we noted above, there was sufficient evidence to tie the bullet to defendant, and the bullet served to make more likely the prosecutor's theory that defendant did possess a gun during the charged incidents. We find no error requiring reversal.

that an error occurred with respect to the court reporter's actions, an objection would simply have resulted in a different person doing the swearing in and there is no indication that the result of the proceedings would have been different. *Toma*, 462 Mich 302-303.[10]

Defendant argues that his attorney improperly failed to object to the various issues of prosecutorial misconduct analyzed above. However, as noted, no prosecutorial misconduct actually occurred, and counsel was not required to raise futile objections. *Flowers*, 222 Mich App at 737-738.

Defendant argues that his attorney improperly failed to object to evidence of the January 4, 2010, incident[11] and to the "shooting into the house" evidence. This evidence was admissible, as discussed, and again, counsel was not required to raise futile objections. *Id.*

Defendant argues that defense counsel improperly failed to file a motion for the judge to recuse himself. This argument merely rehashes the first issue raised in the supplemental brief and discussed above; there was no basis for recusal and counsel was not required to file a futile motion. *Id.*

Defendant contends that defense counsel "failed to properly investigate the extra-judicial circumstances of an intimate relationship existing between Tracy Ross and Jessie Morgan in order to impeach Ross and Morgan with their motives . . . ." However, defendant offers no supporting documentation that Ross and Morgan had an "intimate relationship" and therefore has failed to meet his burden of demonstrating ineffective assistance of counsel.

Defendant argues that his attorney should have objected to testimony about the laboratory reports. As discussed earlier, even if error occurred with respect to these reports, it was not outcome-determinative and thus cannot serve as the basis for a successful ineffective-assistance claim. *Toma*, 462 Mich at 302-303.

Finally, defendant argues that defense counsel erred by introducing the cocaine evidence. However, it is plausible that counsel wanted to plant an idea in the jurors' minds that the gunshot may have resulted from an unrelated drug deal. We will not second-guess counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). At any rate, the cocaine was not tied to defendant during the trial and therefore any error in the admission of this evidence was not outcome-determinative. *Toma*, 462 Mich at 302-303.

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[9] In his subheading, defendant refers to the swearing in of the jury and the witnesses, but in the substance of his argument he focuses on the swearing in of the jury.

[10] Defendant concedes in his brief that jeopardy had not attached at the time of the swearing in.

[11] We note that defendant reiterates this argument in a separately-labeled portion of his supplemental brief.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro